



New Powers for the Welsh Assembly

BRIEFING

The outcome of the Welsh Referendum on 3 March 2011 shows that a majority of voters are in favour of giving wider powers to the National Assembly for Wales. Accordingly, the Welsh Ministers may now ask the Assembly to approve an order under section 105 of the Government of Wales Act 2006 ("GOW") bringing into force what are defined in GOW section 103(8) as the Assembly Act provisions, that is, GOW sections 107, 108 and 110 to 115.

The Assembly Act provisions allow the Assembly to pass laws which according to GOW section 107(1) are to be known as Acts of the National Assembly of Wales. Proposed Acts of the Assembly are to be called Bills (GOW section 107(2)).

On the coming into force of the Assembly Act provisions, the more limited powers of the Assembly to legislate by Assembly Measures (GOW Part 3) will be repealed (GOW section 106). These include the requirement - which has been the subject of much criticism - for the United Kingdom Parliament to pass legislative competence orders before the Assembly can make laws in new fields.

Legislative competence

An Assembly Act cannot be passed unless it satisfies the conditions laid down by GOW section 108 and Schedule 7. An Assembly Act will not be within the Assembly's legislative competence unless it relates to one or more of the

20 subjects listed in Part I of Schedule 7. These include matters as diverse as agriculture, economic development, education and training, environment, highways and transport, public administration, town and country planning, water and flood defence and the Welsh language. These subjects correspond to the "Fields" mentioned in Schedule 5 to the Act which at present may be dealt with by Assembly Measures.

An important difference between the outgoing and incoming procedures is that, whereas an Assembly Measure can only be enacted in relation to specific matters falling within the Fields, an Assembly Act can be passed in relation to any of the subjects mentioned in schedule 7, unless the Act is outside legislative competence.

Exceptions

Many of the Schedule 7 fields are subject to the exceptions specified in relation to the various entries in that Schedule; any legislation dealing with excepted matters thus cannot be enacted as an Assembly Act.

Geographical limitations

With minor exceptions, an Assembly Act will be outside the Assembly's legislative competence if it applies otherwise than in relation to Wales (GOW s.108).



General restrictions

An Assembly Act, or powers to make subordinate legislation given by an Assembly Act, must not breach any of the general restrictions set out in GOW Schedule 7, Part 2. These restrictions are qualified in the manner provided in GOW Schedule 7, Part 3.

The general restrictions also:

- Preclude changes to the functions of Ministers of the Crown, unless the Minister consents (GOW Schedule 7, paragraph 1).
- Preclude modifications of certain enactments (other than by restating the law, or repealing or revoking spent enactments), including the European Communities Act 1972, the Data Protection Act 1998, the Human Rights Act 1998, the Government of Wales Act 1998 and the main provisions of GOW 2006.
- Preclude certain modifications of Acts of Parliament relating to the Welsh Consolidated Fund.
- Preclude changes to the functions of the Comptroller and Auditor General, unless he or she consents.

Extraterritorial implications

An Act is outside the Assembly's legislative competence if it extends beyond England or Wales, or is incompatible with Convention rights or Community law (GOW s.108(6)(b) and (c)).

Future Powers

When Parliament enacted the Assembly Act provisions, it was envisaged that these would be extended still further in the future. Accordingly, schedule 7 may be amended by Order in Council. Such an Order must be approved by both Houses of Parliament and subject to exceptions by the Assembly (GOW section 109).

It is assumed that future Westminster Acts may vary and extend the legislative competence of the Assembly.

Procedure for Assembly Bills

The procedure for Assembly Bills will be the subject of new Standing Orders made under GOW section 111. So far no such Standing Orders have been adopted, although section 111(1) requires that they must include provisions:

- a) For a general debate, with an opportunity to vote on the Bill's general principles
- b) For consideration of the details of a Bill
- c) For a final stage, when the Bill can be passed or rejected.

Where the external controls described below are enforced, Standing Orders must provide for the Bill to be reconsidered (GOW section 111(6)).

Bills must be in English and Welsh except where Standing Orders provide otherwise (GOW section 111(5)). The English and Welsh texts of Assembly



Acts will be of equal standing (GOW section 156(1)).

Following completion of its passage, an Assembly Bill must be submitted for Royal Assent (GOW section 115) unless any of the external controls described below are applied. Subject to this qualification, there is no requirement for Bills once passed to be approved by the Secretary of State or by the United Kingdom Parliament.

External controls on Assembly Bills

In the following cases an Assembly Bill may be subject to external control:

- **Scrutiny by Supreme Court :** The Counsel General or Attorney General may refer questions of legislation competence to the Supreme Court for a decision (GOW section 112).
- **European Court of Justice :** GOW section 113 makes provisions applicable where legislative competence issues are referred to the European Court.
- **Intervention by Secretary of State :** By GOW section 114 the Secretary of State may by order prevent the submission of an Assembly Bill for Royal Assent if he or she has reasonable grounds to believe that it:
 - would have an adverse effect on any unlisted matter or excepted matter;
 - might have a serious adverse impact on

water resources, water supply or water quality in England;

- would have a serious adverse impact on the operation of law as it applies in England;
- would be incompatible with international obligation or defence or national security.

A statutory instrument containing an order blocking an Assembly Bill is subject at Westminster to the negative procedure (GOW section 114(8)).

Conclusion

The yes vote will be seen by many as a major step forward in the devolution progress, yet the Assembly's new functions will still leave it with far narrower powers than the Scottish Parliament, and will have no effect in key areas such as taxation which will remain non-devolved.

Despite this, the changes are sure to develop Wales's position within the United Kingdom and the wider world. Wales is already an emerging legal jurisdiction, with its own legislature, and has been developing its own body of law. The 2011 referendum result is bound to strengthen these trends. These realities must be recognised by all who do business or discharge responsibilities in or in relation to Wales.



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